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No. 97-1235

In The

Supreme Court of the United States

October Term, 1997

CITY OF MONTEREY,

Petitioner,

v.

DEL MONTE DUNES AT MONTEREY, LTD. AND MONTEREY-DEL MONTE DUNES CORPORATION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether, in a regulatory takings action challenging a local land use decision, 42 U.S.C. § 1983 requires that all inverse condemnation liability issues be determined by the court rather than by a jury.

2. Whether liability for a regulatory taking can be based upon a standard that allows a jury or court to reweigh evidence concerning the reasonableness of the public entity's land use decision.

3. Whether the rough proportionality standard established by this Court in *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), in the context of property exactions was properly applied by the Ninth Circuit to an inverse condemnation claim based upon a regulatory denial.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINION BELOW

The opinion of the court of appeals is reported at 95 F.3d 1422 (9th Cir. 1996). The relevant, prior orders of the district court are unreported but are included in the appendix to the Petition For A Writ of Certiorari at Pet. App. 30-43.

JURISDICTION

The court of appeals filed its initial opinion on September 13, 1996 (95 F.3d 1422). The court of appeals initially granted rehearing on June 26, 1997 (Pet. App. 44) and subsequently decided on October 28, 1997 not to amend its opinion. (Pet. App. 46). The Petition For A Writ of Certiorari was filed on January 26, 1998 and was granted on March 30, 1998. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution, Section 1, which provides in pertinent part:

   > No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. The Fifth Amendment to the United States Constitution, which provides in pertinent part:

   > No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. The Seventh Amendment to the United States Constitution, which provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact trial by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

4. 42 U.S.C. § 1983, which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT

This case involves a 37-acre parcel of undeveloped property located in the coastal area of the City of Monterey ("City") in California. Faced with conflicting information concerning environmental impacts and other issues, the City denied Del Monte Dunes' request to build a 190-unit condominium development in an environmentally sensitive beachfront area. Federal and state regulatory agencies, City staff and others participating in the public hearing process advised the City Council that the developer had not yet formulated a plan that would adequately mitigate likely impacts of the proposed development. While Del Monte Dunes presented contrary information, the City Council concluded that Del Monte Dunes had not yet sufficiently addressed environmental

problems and other concerns. Consequently, the City refused to approve the proposed project.

After considering essentially the same evidence that was evaluated by the City Council, the trial court ruled that the City's decision did not violate any substantive due process right of Del Monte Dunes. The trial court concluded that "the City Council was not acting arbitrarily and irrationally in passing a resolution in June of 1986 [denying the proposed development], it was acting for valid regulatory reasons and not attempting to forestall all reasonable development." Pet. App. 43.

The jury was allowed to decide Del Monte Dunes' claims for inverse condemnation and denial of equal protection. With respect to the inverse condemnation claim, the jury was allowed to determine whether the City's action substantially advanced a legitimate purpose; that is, whether denial of a 190-unit condominium development in an environmentally sensitive area bore a reasonable relation to the City's legitimate goal of protecting the environment. The jury was also allowed to determine whether the City's decision had deprived Del Monte Dunes of all economically viable use of the subject property even though Del Monte Dunes had sold the property for $4.5 million ($800,000 more than its purchase price) while the case was pending.

Without indicating which of these theories of inverse condemnation liability it had accepted, the jury concluded that a regulatory taking had occurred and awarded damages of $1.45 million.[1] The Ninth Circuit

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[1] The jury also found in favor of Del Monte Dunes on its equal protection claim. Because the Ninth Circuit affirmed the judgment on the basis of the jury's inverse condemnation

affirmed the jury's decision, concluding that these issues were properly triable to the jury and that there was some evidence to support a jury determination that the City's decision was either unreasonable or at least not roughly proportional to the City's legitimate concerns.

1. The Subject Property.

This action arises out of efforts by Del Monte Dunes and its predecessors to build a 190-unit condominium development on a 37-acre parcel of undeveloped coastal property within the area known as Del Monte Beach. This property lies within the City's jurisdiction and, in the first instance, is subject to the City's planning policies and regulations. The City's general plan designates the property for multi-use residential development, which includes condominium development. Tr. Exh. 6 at pp. 30 & 34.[2]

The subject property and the rest of the Del Monte Beach area also lies within the jurisdiction of the California Coastal Commission ("Coastal Commission"). R. 231-32. The Coastal Commission has final regulatory control over developments in coastal areas, and any proposed coastal development approved by the City must

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verdict, it did not reach the merits of the equal protection claim or the City's appeal therefrom, and that claim is not before this Court. If the Ninth Circuit's decision is reversed as to the inverse condemnation claim, this case must be remanded to the Ninth Circuit for a decision on the equal protection cause of action.

[2] All trial exhibits referenced herein were introduced at trial as joint exhibits. Prior to the commencement of trial, the parties stipulated to the admissibility of trial exhibits numbers 1-120, 122-134, and 136-165. R. 7-9.

also comply with Coastal Commission requirements. R. 232. Included was a requirement that any development in the Del Monte Beach area would require a detailed restoration plan describing how the developer would mitigate impacts on the existing habitat. Jt. App. 202-05; Tr. Exh. 28.

Substantial portions of the subject property consisted of sand dunes that are among the largest and best preserved in any of the Central California dune systems. Tr. Exh. 48 at p. 15. These dunes provide natural habitat for various types of native plants and animals. Most significantly, the dunes are home to a type of native buckwheat which is the natural habitat of the endangered Smith's Blue Butterfly ("SBB"). Jt. App. 136-37. Due to the presence of this buckwheat, the SBB and other habitat, the City, the U.S. Fish and Wildlife Service ("USFWS"), the California Department of Fish and Game ("Cal DFG") and the Coastal Commission all considered the subject property to be environmentally sensitive and important. Jt. App. 11-18, 42-44, 84-88 and 200-01.

2. The 1984 Conditional Site Plan Approval.

Prior to late 1984, the subject property was owned by Ponderosa Homes ("Ponderosa"). During the early 1980s, Ponderosa pursued efforts to develop the subject property, beginning with a proposed 344-unit development that included a clubhouse, swimming pool, and tennis courts. R. 259-60. Gradually, Ponderosa scaled back its proposal. By mid-1984, Ponderosa had redesigned its proposal to consist of a 190-unit condominium development.

In September of 1984, Ponderosa sought approval of a site plan for this proposed 190-unit development. Jt.

App. 57. The site plan identified the number of units, the proposed layout of those units and designated access routes. Because the proposed development would affect sensitive dune habitat, Ponderosa prepared a preliminary habitat restoration plan that described measures to mitigate the environmental damage likely to result from the proposed development. Jt. App. 21-31. Ponderosa circulated this preliminary restoration plan to the City, Cal DFG, USFWS and others.

The City actively sought input from USFWS in light of its recognized expertise in such matters. R. 271-72. When the time came for the City Council to make a decision on the proposed site plan in September of 1984, however, USFWS responded that they needed more information to evaluate the adequacy of the preliminary restoration plan. Jt. App. 50-51; Tr. Exh. 84 at p. 16. Due to the lack of definitive input regarding the preliminary restoration plan, the City Council deferred final approval of the proposed 190-unit development. Jt. App. 59. Instead, the City Council granted a conditional use permit ("CUP"), which conditionally approved the site plan, and thereby expressed general acceptance of the location, density and accessways for the project. Jt. App. 60-65. In so doing, however, the City Council and staff made clear that the 190-unit development would be given final approval only if the developer could adequately mitigate the harm to the habitat likely to be caused by the proposed development. Tr. Exh. 84 at p. 16; R. 828-29. The CUP required that the final habitat protection measures satisfy the criteria in the local coastal plan and that those measures be reviewed and approved by the City, the USFWS and Cal DFG. Jt. App. 62. The CUP expressly provided that, if it appeared that the final restoration

plan would not adequately mitigate the environmental impacts of the proposed 190-unit development, the developer would be required to modify and resubmit its site plan. Jt. App. 62.

3. The City's 1986 Denial of the Proposed Development.

In late 1984, Del Monte Dunes purchased the subject property from Ponderosa for approximately $3.7 million. R. 511. Thereafter, it pursued efforts to obtain final approval for the proposed 190-unit development. Among other things, Del Monte Dunes prepared a final restoration plan and circulated that plan to the City, USFWS, Cal DFG and others. Jt. App. 108-34; R. 281 & 838-39.

The "final" restoration plan was completed in February 1986. Jt. App. 108-34. In general, the final plan designated certain portions of the subject property as preservation areas that would not be impacted by the development. Jt. App. 119-21. Public access to these designated areas was to be restricted to protect the habitat located therein. Jt. App. 120. Portions of the subject property that would be altered by construction activities were deemed "restoration" areas. Jt. App. 121. The final plan contemplated that native plants would be removed from these areas prior to the construction and efforts would be made to revegetate the impacted areas after construction was completed. Jt. App. 121-23. After these efforts to revegetate the affected areas, the developer or its designee would be responsible for a maintenance program for several years. Jt. App. 128. Thereafter, Del Monte Dunes' final restoration plan contemplated that maintenance responsibility for the restoration areas would be turned over to an appropriate public agency,

such as the California Department of Parks and Recreation. Jt. App. 128-29.

The City Council held public hearings on the proposed development in May and June of 1986. During the months preceding those hearings, the City's staff actively sought and obtained input concerning the final restoration plan from a wide variety of sources. Jt. App. 78, 145-46, 150 and 287-88. Most of that input indicated that the final plan was deficient in important respects. The view expressed by the USFWS in a letter presented to the City Council at the public hearings was that "the project will destroy most, if not all, of the Smith's blue butterflies (SBB) and their host plants on the site, and the final restoration plan will not likely succeed in replacing lost habitat or preserving SBB at that location." Jt. App. 150. The USFWS letter also referenced its own prior biological opinion, generated the preceding year, which had concluded that, although the proposed development was not likely to jeopardize the continued existence of the SBB species as a whole, it would destroy important buckwheat habitat. Jt. App. 78. USFWS also asserted in its biological opinion that the restoration plan had "little chance for long term success . . . ." Jt. App. 78.

The Cal DFG was also critical of the final restoration plan. The Cal DFG representative at the public hearings asserted that it continued to have problems with the project and that the final restoration plan had not been approved by the Cal DFG. Jt. App. 287-88. Dr. Richard Arnold, an outside expert on habitat protection issues, echoed these concerns over the proposed habitat mitigation measures, as did others. R. 860-64.

Del Monte Dunes disagreed with the concerns expressed over the final restoration plan. Its consultant, Dr. Richard Bright, attended the public hearings and opined that the final restoration plan was adequate and, in fact, would ultimately improve the condition of the site. Tr. Exh. 150 at pp. 20-34.

After considering all of this information, the City Council denied Del Monte Dunes' application for final approval of the proposed 190-unit development. Tr. Exh. 151. Among other things, the City Council cited the inadequacy of the final restoration plan and the unwillingness of state and federal agencies to express their approval of that plan.[3] Tr. Exh. 150 at pp. 47-55; Tr. Exh. 151.

The City Council's denial of the proposed 190-unit development did not modify the existing general plan or zoning ordinances, which continued to permit residential development on the subject property. Tr. Exh. 151. Nor did the City Council express any views about the likelihood that a revised plan or development would be approved. Nevertheless, Del Monte Dunes made no subsequent attempt to modify its development proposal in order to meet the problems identified by the City Council. R. 288. Because it felt that any redesign would reduce

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[3] Another problem considered by members of the City Council in denying the proposed development was that Del Monte Dunes had not yet acquired the property needed to provide the secondary access that was required for the project. Some members of the City Council raised a concern that Del Monte Dunes apparently expected the City to exercise its power of eminent domain to acquire the necessary property for this secondary accessway. Jt. App. 289-90. These council members further expressed a reluctance to use the City's condemnation power to benefit a private party. Jt. App. 289-90; Tr. Exh. 150 at pp. 47-51.

density or increase costs so as to make the project unprofitable, Del Monte Dunes was not interested in pursuing any such alternatives. R. 288-89. Instead, Del Monte Dunes filed suit against the City, asserting that the City's decision to deny its application had denied Del Monte Dunes its right to substantive due process and equal protection, and had resulted in the taking of the subject property.

During the pendency of the action, Del Monte Dunes sold the subject property in 1991 to the State of California for $4.5 million. R. 518-19. In arriving at the $4.5 million dollar purchase price, the State relied upon an appraisal that assumed that the highest and best use of the property was for residential development with a density of up to 150 units. R. 532-33 & 535-37.

4. The Allocation of Decision-Making Responsibility at Trial.

Prior to the commencement of trial, the City requested that the liability issues raised by each of Del Monte Dunes' claims be decided by the court rather than the jury. Jt. App. 1, USDC Docket Entry No. 105. The district court granted this request insofar as it was directed at the substantive due process claim and concluded that it would decide whether the City's actions were arbitrary and capricious. Pet. App. 33. However, the district court ruled that all aspects of Del Monte Dunes' equal protection and inverse condemnation claims would be decided by the jury. Pet. App. 33-34.

The evidence at trial consisted largely of the same conflicting evidence that the City Council had considered in mid-1986 when it denied the proposed development. Del Monte Dunes presented the same consultant that it

had presented to the City Council, and he expressed the same opinion that the final habitat restoration plan was adequate. R. 332-76. The City introduced contrary opinions from Dr. Richard Arnold, who had also previously expressed his opinions to the City Council. R. 1054-86. The City also introduced as evidence the same USFWS and Cal DFG evaluations considered by the City Council in 1986, which described likely environmental impacts and inadequacies in the final restoration plan. *See, e.g.*, Jt. App. 149, 150-52 and 287-88.

After hearing all of the evidence, the trial court concluded that the City had not acted arbitrarily and capriciously so as to violate Del Monte Dunes' right to substantive due process. The court noted that "exhaustive time and energy was spent by the staff of the City and by its planning commission in working on this development" and that "it was all a sincere effort by those people." Pet. App. 41. The court went on to conclude that, in rejecting the proposed development, the City "was not acting arbitrary and irrationally . . . it was acting for valid regulatory reasons and not attempting to forestall all reasonable development." Pet. App. 43. In arriving at this conclusion, the district court specifically noted that the proposed project raised significant environmental issues that both USFWS and Cal DFG had concluded were not adequately mitigated. Pet. App. 42.

In contrast, with respect to the claims for denial of equal protection and for inverse condemnation, the jury concluded that the City's denial of the proposed 190-unit condominium development had violated Del Monte Dunes' constitutional rights. Jt. App. 1, USDC Docket Entry No. 141. Although Del Monte Dunes had sold the subject property during the pendency of the action for

$4.5 million, the jury awarded $1.45 million in temporary takings damages.

5. The Ninth Circuit's Reasonableness and Rough Proportionality Standard of Liability.

The Ninth Circuit ruled that all issues relating to the inverse condemnation claim were properly submitted to the jury for decision. Pet. App. 7-15. The court reasoned that such inverse condemnation claims were analogous to common law damage actions, such as actions for trespass, which historically had been triable by jury. Pet. App. 9. The Ninth Circuit further concluded that the underlying issues of inverse condemnation liability were questions of fact for the jury, rather than mixed questions of fact and law of a type that were properly decided by the court. Pet. App. 15.

As to the standard that should be applied to determine whether the jury's inverse condemnation verdict could be upheld, the Ninth Circuit applied a reasonableness test. The court determined that the jury's decision was sustainable as long as there was evidence in the trial record that would support a finding that the City had acted unreasonably in concluding that the proposed project failed to provide adequate protection for sensitive environmental habitat or otherwise failed to satisfy the conditions imposed by the City's prior conditional approval of the site plan. Pet. App. 14, 16-20.

In arriving at this reasonableness standard, the Ninth Circuit did not simply determine whether the jury could have properly found that the City's action in denying the proposed 190-unit project failed to substantially advance the legitimate public goal of protecting the environment.

Instead, the court applied the standard of rough proportionality based on *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), which was decided several months after the trial in the present action. In framing the issue, the Ninth Circuit reasoned that "[e]ven if the City had a legitimate interest in denying Del Monte's development application, its action must be 'roughly proportional' to furthering that interest." Pet. App. 16. The Ninth Circuit concluded that "[s]ignificant evidence supports Del Monte's claim that the City's actions were disproportional to both the nature and extent of the impact of the proposed development." Pet. App. 20.

SUMMARY OF ARGUMENT

1. The availability of a right to jury trial in inverse condemnation claims brought under 42 U.S.C. § 1983 depends on whether such claims, and the issues encompassed therein, were triable by jury at common law when the Seventh Amendment was adopted. At common law, governments have long exercised the power to take private property for public use by exercising their power of eminent domain and initiating condemnation proceedings. When a public entity initiates such an action, the courts have consistently recognized that the property owner has no right to a jury in condemnation proceedings because the historical practice both in England and in the Colonies did not include a trial by jury for governmental takings.

Inverse condemnation actions are also based on claims that a government entity has taken private property and must pay just compensation. Like a direct condemnation proceeding, a claim for inverse condemnation

arises from the Fifth Amendment and seeks just compensation for the "taken" property. That an inverse condemnation action is initiated by the property owner, rather than by the government, does not change its essential nature. Inverse condemnation actions are equivalent to direct condemnation proceedings and therefore are not triable by jury under the Seventh Amendment or Section 1983.

Separate and apart from the historical absence of a right to jury trial in condemnation proceedings at common law, there is a second reason why juries should not decide liability issues in inverse condemnation actions based upon an alleged regulatory taking. By their nature, those liability issues are not based primarily on the resolution of disputed facts. Rather, those issues involve legalistic determinations that require consideration of the appropriate balance among competing concerns and due deference to local land use decision-makers. One theory of regulatory taking liability – whether a regulation substantially advances a valid public purpose – is directly analogous to substantive due process challenges, which have consistently been decided by courts as a matter of law or as a mixed question of fact and law. The other theory – whether the regulation deprives the property of all economically viable use – also involves interwoven factual and legal determinations that are more properly decided by courts.

2. No less important than who should decide inverse condemnation liability issues is the appropriate standard to be applied in reviewing decisions of local public entities. Recognizing that federal courts are not to become federal land use planners, courts have consistently refused to second-guess the wisdom or factual

correctness of local land use decisions. Instead, they have accorded deference to determinations made by local legislative and administrative bodies. For this reason, when a property owner asserts a takings claim on the theory that a land use regulation or permit denial fails to substantially advance a legitimate purpose, courts have rejected such claims as long as there is some logical relationship between the regulation and the goal identified by the public entity.

The Ninth Circuit's decision eliminates this deference and fundamentally changes the standard for inverse condemnation liability. By treating inverse condemnation liability issues as purely factual matters and allowing a jury to impose liability based upon its *de novo* determination of the reasonableness of the City's land use decision, the Ninth Circuit has established a new standard that allows *de novo* consideration of such decisions. This new standard creates a constitutional violation whenever a second decision-maker (judge or jury) concludes that it would have reached a different conclusion than the public agency.

3. The Ninth Circuit's affirmance of the jury's inverse condemnation decision must also be set aside because that affirmance was based upon the use of a "rough proportionality" standard of liability that does not apply in a regulatory takings context and that was never presented to the jury in this case. The "rough proportionality" standard of inverse condemnation liability was established in *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), to impose limitations on a public entity's ability to require the conveyance of property as a condition of development approvals. Neither the holding nor the rationale of *Dolan* applies to a regulatory denial.

Unlike the situation in *Dolan*, a regulatory denial does not involve a compelled conveyance of a property interest to the public. Additionally, the rough proportionality standard cannot be applied in any meaningful way in a regulatory denial context. In a situation involving a required dedication of property, the burden of a proposed development can be compared to the property interest being dedicated to determine the "rough proportionality" of the dedication requirement. However, a regulatory denial does not allow such a comparison. There is no second side of the "rough proportionality" equation that can be compared to the impacts or concerns which prompted denial of the project.

ARGUMENT

During recent decades, this Court has worked to strike an appropriate balance in defining the role of the Constitution and federal courts in local land use decision-making. This Court has recognized that, in the first instance, such decisions are primarily matters of state law. When disputes arise over such decisions, such disputes must first be considered in the state courts. *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 186 (1985). This approach is consistent with the historically limited role of the federal courts and federal law in the local land use context.

On a substantive level, federal courts have accorded substantial deference to local decision-makers in land use decision-making that involves only regulatory impacts. Recognizing that local officials must have discretion to regulate and balance competing interests and policies, courts step in only in extreme cases involving regulations that do not substantially advance public interest or that

have confiscatory impact. *See Agins* v. *City of Tiburon*, 447 U.S. 255, 260 (1980). At the same time, the Supreme Court has imposed a higher standard of scrutiny when local entities attempt to extract for the public the actual right to use property interests held by private parties. *See Dolan*, 512 U.S. at 391 (requirements that property owner dedicate interest to the public are valid only if the dedication requirement is roughly proportional to the burdens of the proposed development).

The Ninth Circuit's decision seriously upsets the balance between the legitimate role of the Constitution in protecting property rights and the discretion needed by local governments to regulate land use. Rather than having local planning decisions evaluated by courts experienced in applying deferential legal standards and sensitive to federalism concerns, the Ninth Circuit would have juries consider *de novo* the evidence considered in the land use process and impose liability on local decision-makers if the jury disagrees with the reasonableness of the land use decision. What's more, the Ninth Circuit's decision would impose liability on local public entities for regulatory denials of proposed development projects based on a supposed failure to meet a roughly proportional standard that has no meaningful application in the regulatory takings context. The City requests that the Court restore the balance that the Ninth Circuit has disturbed.

I. THERE IS NO RIGHT TO JURY DETERMINATION OF INVERSE CONDEMNATION LIABILITY ISSUES.

Courts, and not juries, have been responsible for adjudicating claims that a private party is entitled to just

compensation for a taking of property under the Fifth Amendment. Courts have done so because, as a matter of historical practice, condemnation claims were not triable by jury at common law. Courts have also done so because, especially in the context of regulatory takings, the nature of the liability standards make resolution of those issues the appropriate domain of the courts.

In the face of this longstanding practice, Del Monte Dunes sought and obtained the right to have the jury determine whether inverse condemnation occurred and impose liability on the City. The jury was asked to apply the amorphous standards of inverse condemnation liability that have frequently bedeviled courts over the years. Whereas, as a matter of law, this Court has consistently upheld local land use decisions and regulations in the face of claims that they did not substantially advance legitimate public goals, the jury in this case was allowed to decide, as a factual matter, that denial of a proposed 190-unit condominium in an environmentally sensitive area did not reasonably relate to the City's environmental protection goals or other concerns. Whereas this Court has rejected taking challenges, as a matter of law, even when the regulatory action dramatically reduced the value of property, the jury in this case was allowed to decide, as a factual matter, that the subject property had no economically viable use even while the City's planning guidelines permitted residential development and the property was sold to the State of California for $4.5 million in its "taken" condition. It was error for the Ninth

Circuit to affirm the jury's resolution of either of these inverse condemnation liability issues.[4]

A. Section 1983 Does Not Alter the Longstanding Practice That Claims Based Upon the Fifth Amendment Are Not Actions Triable by Jury at Common Law.

1. Section 1983 Neither Broadens Nor Narrows the Seventh Amendment Right to Jury Trial Applicable to the Underlying Federal Claim That Gives Rise to a Section 1983 Claim.

In determining the scope of the right to jury trial in actions brought under 42 U.S.C. § 1983, the threshold inquiry is whether the language or legislative history of Section 1983 evidences an intent to confer a statutory right to jury trial independent of Seventh Amendment requirements. *Tull* v. *United States*, 481 U.S. 417, 417 n.3 (1987); *Curtis* v. *Loether*, 415 U.S. 189, 192 n.6 (1974). When such an intent can be discerned, the right to a jury can be decided without regard to the Seventh Amendment. *Lorillard* v. *Pons*, 434 U.S. 575, 577 (1978).

It is well settled that 42 U.S.C. § 1983 is not a source of substantive rights but merely provides a vehicle for

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[4] The jury was asked to determine inverse condemnation liability under two theories: a) whether the City's denial of the project substantially advanced a legitimate public purpose; and b) whether the City's decision deprived the property of all economically viable use. Because the jury's verdict did not indicate which of these theories formed the basis of its liability finding, the Ninth Circuit recognized that the jury's inverse condemnation verdict could be upheld on appeal only if each of these theories was properly submitted to the jury and legally supportable. Pet. App. 10.

vindicating rights that are conferred by other federal laws. *Albright* v. *Oliver*, 510 U.S. 266, 271 (1994). Consistent with its non-substantive nature, Section 1983 makes no independent or express provision for jury determination of claims or issues arising thereunder. Instead, Section 1983 provides generally that an aggrieved party deprived of any constitutional, common law or statutory right existing under federal law may seek redress "in an action at law, suit in equity or other proper proceeding . . . ."

The derivative nature of Section 1983 strongly suggests that Congress did not intend that Section 1983 would create an independent, statutory right to jury trial for claims arising thereunder. Unlike statutory measures that address a single discrete subject and provide specific remedies pertinent to that subject, Section 1983 can be used to vindicate a wide range of underlying rights. By providing that redress under Section 1983 could be obtained in "an action at law, suit in equity or other proper proceeding," Congress did not attempt to foreclose jury entitlement in appropriate cases "at law," but it also recognized that, depending upon the nature of the underlying right, redress could be obtained in a non-jury action for equitable relief or in some other form of proceeding.

The limited legislative history of Section 1983 is consistent with the absence of any Congressional intent to confer an independent, statutory right to jury, separate and apart from the underlying substantive rights being pursued. As the Court noted in *Monell* v. *Department of Social Services*, 436 U.S. 658, 665 (1978), in discussing the legislative history of the Civil Rights Act of 1871, "Section 1, now codified as 42 U.S.C. § 1983, was the subject of

only limited debate and was passed without amendment." To the extent that any intent was expressed in the debates leading to the adoption of § 1983, that intent was simply to provide remedies as broad as the protections afforded by the Constitution. *Id.* at 685 ("[Section 1 is] so simple and really [reenacts] the Constitution.") (quoting Senator Edmonds).

Under these circumstances, it is not possible to discern any congressional intent to grant a right to jury trial above and beyond the right to jury trial that exists under the Seventh Amendment. For this reason, the Ninth Circuit's statement that Section 1983 creates a statutory right to jury trial is wrong. While there clearly exists a right to jury for some types of actions and issues brought under Section 1983, the source of that right is the Seventh Amendment, not Section 1983 itself. *Cf. Curtis* v. *Loether*, 415 U.S. 189, 194 (1974) (right to jury trial in damage action under Title VII of the Civil Rights Act of 1968 arose under the Seventh Amendment); *see also Dolence* v. *Flynn*, 628 F.2d 1280, 1282 (10th Cir. 1980); *Burt* v. *Abel*, 585 F.2d 613, 616 n.7 (4th Cir. 1978); *Amburgey* v. *Cassady*, 507 F.2d 728, 730 (6th Cir. 1974).

2. Inverse Condemnation Claims Are Analogous to Eminent Domain Proceedings, Which Were Not Triable by Jury at Common Law.

In determining whether a particular claim or issue carries with it a right to jury trial under the Seventh Amendment, the focus is on whether that claim or issue was triable by jury at common law or is analogous to one that was. *Markman* v. *Westview Instruments, Inc.*, 517 U.S. 370, 378 (1996). For this purpose, courts compare "the

action in question to 18th-century actions brought in the courts of law and equity." *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 42 (1989).

An action for inverse condemnation based upon an alleged regulatory taking did not exist, as such, when the Seventh Amendment was adopted. However, as the term "inverse condemnation" would suggest, the nature of an inverse condemnation claim is an alleged appropriation of private property by a governmental entity for which compensation must be paid. As such, inverse condemnation proceedings are equivalent to actions by which a government affirmatively exercised its power of eminent domain to acquire private property.

The Court has consistently recognized that there is no common law right to jury in eminent domain proceedings.[5] *United States* v. *Reynolds*, 397 U.S. 14, 18 (1970) ("it has long been settled that there is no constitutional right to a jury in eminent domain proceedings."); *Bauman* v. *Ross*, 167 U.S. 548, 593 (1897) ("By the constitution of the United States, the estimate of the just compensation for property taken for public use, under the right of eminent domain, is not required to be made by a jury . . . ."). Courts have reached this conclusion because the practice both in England and in the majority of the thirteen colonies for the assessment of compensation where property was taken for public use did not involve a

[5] For the purposes of deciding whether a claim or issue is properly decided by a jury, the focus is not simply whether an analogous proceeding existed at common law, but whether that analogous proceeding was decided by a jury at common law. *See, e.g., Atlas Roofing Co.* v. *Occupational Safety Comm'n*, 430 U.S. 442, 458 (1977) ("Condemnation was a suit at common law but constitutionally could be tried without a jury.").

common law jury of twelve presided over by a judge. *See United States* v. *Reynolds*, 397 U.S. 14, 18 (1970); *Chicago B & Q R. Co.* v. *Chicago*, 166 U.S. 226, 245 (1897); *see also* 1A Nichols, *The Law of Eminent Domain*, § 4.105 [1] at 4-137 (3rd ed. & 1992 Supp.); Note, *Federal Condemnation Proceedings and the Seventh Amendment*, 41 Harv. L. Rev. 29, 32-38 (1927). Consistent with the analysis employed in federal courts, the overwhelming majority of state courts have also concluded that these state constitutional provisions that protect or preserve the right to jury trial existing at common law do not apply to condemnation proceedings. 1A Nichols, *The Law of Eminent Domain* § 4.105[3] at 4-146 n.20 (3rd ed. & 1992 Supp.); *see also Hensler* v. *City of Glendale*, 8 Cal. 4th 1, 15 (1994), *cert. denied*, 115 S. Ct. 1176 (1995); *Rueth* v. *State*, 596 P.2d 75, 94 (Idaho 1978).

That inverse condemnation actions are initiated by the property owner, rather than by the government, does not change their nature. *See First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 315 (1987) ("The fact that condemnation proceedings were not instituted and that the right [to just compensation] was asserted in suits by the owners did not change the essential nature of the claim.") (quoting *Jacobs* v. *United States*, 290 U.S. 13, 16 (1933)); *see also Hurley* v. *Kincaid*, 285 U.S. 95, 104 (1932). Accordingly, for purposes of determining whether there exists a right to jury trial for inverse condemnation claims brought under Section 1983, the most analogous type of proceeding is that involving the exercise of the power of eminent domain actions. *See City of Northglenn* v. *Grynberg*, 846 P.2d 175, 178 (Colo.), *cert. denied*, 510 U.S. 815 (1993) (trial court decides inverse condemnation liability issue; "Because an inverse condemnation action is based on the 'takings' clause of our

constitution, it is to be tried as if it were an eminent domain proceeding.").

This rationale has been adopted by the Eleventh Circuit in *New Port Largo, Inc.* v. *Monroe County*, 95 F.3d 1084, 1092 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 2514 (1997). In that case, the court held that there was no right to have a jury decide liability issues in a regulatory takings context. In reaching this result, the Eleventh Circuit reasoned that it had "discovered no indication that the rule in regulatory takings cases differs from the general eminent domain framework, in which issues pertaining to whether a taking has occurred are for the court while damage issues are the province of the jury." *Id.*

The establishment of a federal right to jury trial in inverse condemnation cases would not only be unsupportable by reference to common law practice, but would also potentially conflict with the procedures employed in many states and give rise to anomalous results. Under ripeness principles, an aggrieved property owner is ordinarily required to have its regulatory takings claim adjudicated in state courts, at least initially.[6] However, in most states, including California, courts and not juries, are responsible for deciding whether a regulatory taking has occurred. *Hensler* v. *City of Glendale*, 8 Cal 4th 1, 15 (1994), *cert. denied*, 115 S. Ct. 1176 (1995). Under these circumstances, creating a federal right to jury determination of regulatory takings issues would be either meaningless (because those issues will be conclusively decided

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[6] Del Monte Dunes was not required to pursue remedies in state court before filing this federal action because, at the time of the alleged taking, it was not established that a damage remedy was available in California courts. *Del Monte Dunes* v. *City of Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990).

by state courts under applicable state procedures) or disruptive to state court proceedings (if the federal right to jury impairs the preclusive effect of the state court adjudication).

3. The Ninth Circuit's Analysis Misconceives the Constitutional Origins and Nature of Regulatory Takings Claims.

In concluding that there was a right to have juries decide inverse condemnation claims, the Ninth Circuit analogized regulatory takings to common law actions for trespass and focused upon the availability of a "damage" remedy in the form of just compensation. This analysis is flawed.

A regulatory taking claim is not analogous to common law trespass. Whereas common law trespass involves the wrongful physical interference with property rights, regulatory takings do not. Regulatory takings do not involve physical dispossession or damage to property. Nor does a regulatory takings claim depend upon a showing of wrongful or tortious conduct. Rather, a regulatory takings claim provides a means to ensure that the impact of governmental regulation or action is not borne disproportionately by individual property owners. *Agins*, 447 U.S. at 260.

Significantly, the primary authority cited by the Ninth Circuit to support its effort to analogize regulatory takings claims to common law trespass was *Beatty* v. *United States*, 203 F. 620, 626 (4th Cir. 1913), *writ of error dismissed* and *cert. denied*, 232 U.S. 463 (1914). However, the *Beatty* decision is inconsistent with pronouncements of this Court regarding the availability of jury trial in the

condemnation context and has been overruled by implication by subsequent decisions in the Fourth Circuit. *United States* v. *Keller*, ___ F.3d ___, 1998 W.L. 199713 (4th Cir. 1998); *United States* v. *21.54 Acres of Land*, 491 F.2d 301, 304, 306-307 (4th Cir. 1973). The flaw in analogizing inverse condemnation claims to trespass claims improperly ignores both the Fifth Amendment origin of those claims and the well-documented absence of a common law right to have a jury resolve issues arising out of takings by the government.

The Ninth Circuit's emphasis on the availability of a monetary remedy in inverse condemnation actions is also misplaced. In some circumstances, courts rely on the nature of the remedy in analyzing the right to jury under the Seventh Amendment. When the right to jury depends upon whether the cause of action can most accurately be characterized as one "at law" rather than "in equity," this focus upon remedy and the availability of damages is appropriate. However, in considering inverse condemnation claims, the distinction between law and equity and the focus on remedies are largely irrelevant. They are irrelevant because historically condemnation matters were not triable by jury *despite* the availability of a just compensation remedy.

B. The Nature of The Liability Issues That Must Be Resolved in a Regulatory Takings Case Provides a Separate Reason Why Those Issues Are Not Properly Decided by a Jury.

Aside from the absence of any right to jury trial in condemnation proceedings in general, there is a second, independent reason why juries should not be permitted to determine whether a regulatory taking has occurred. It

is well settled that, in determining the proper role of juries, the inquiry does not stop with whether the claim is one in which the jury played a role at common law. Rather, even assuming that the jury has some role, it is necessary to determine whether the particular issues in dispute are properly triable by the jury. *See Markman*, 517 U.S. at 376. In making this inquiry, the test is "whether the jury must shoulder this responsibility [to decide the issue] *as necessary to preserve the substance of the common-law right of trial by jury.*" *Id.* at 377 (emphasis in original).

In the present case, the jury was asked to determine two separate theories of takings liability: a) whether the City's action substantially advanced a legitimate purpose; and b) whether the City's denial of the 190 unit project deprived the subject property of all economically viable use. Each of these issues is predominantly legal and must be resolved by the courts to ensure that takings standards are applied consistently and with due regard to the limited role of the Constitution in local land use decision-making.

1. Courts, and Not Juries, Must Decide the Predominantly Legal Issue of Whether a Local Regulation or Land Use Decision Substantially Advances a Legitimate Public Purpose.

More than seventy-five years ago, the Court first extended the Fifth Amendment beyond cases involving direct appropriation of property or its functional equivalent. *See generally Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922). Since that time, this Court has stated on several occasions that a regulatory taking will occur if a governmental regulation or action does not substantially

advance a legitimate public purpose. *Agins*, 447 U.S. at 260. In these prior decisions, the Court has not expressly addressed the issue of whether this component is one of fact for resolution by juries or one of law for courts. However, the nature of this issue and the analysis employed by courts in the takings and analogous substantive due process contexts lead to the inescapable conclusion that courts, and not juries, must decide this issue.

That courts should decide whether governmental regulations substantially advance a legitimate public goal derives, in substantial part, from the nature of the inquiry. A claim that a governmental regulation does not bear the requisite relationship to a legitimate objective does not contemplate a reweighing of the information available to the governmental agency or a redetermination of the wisdom or correctness of that regulation. Rather, the focus is upon the existence of facts or circumstances sufficient to demonstrate that the challenged action was not arbitrary and that the governmental agency had some basis for its action. *Agins*, 447 U.S. at 261; *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 395 (1926); *Clajon Production Corp.* v. *Petera*, 70 F.3d 1566, 1579-1580 (10th Cir. 1995); *Esposito* v. *South Carolina Coastal Council*, 939 F.2d 165, 169 (4th Cir. 1991), *cert. denied*, 505 U.S. 1219 (1992). By its nature, this is a predominantly legal issue. Courts apply this sort of limited review in a variety of contexts and have developed substantial institutional competence in doing so. By way of contrast, juries are not customarily called upon to review the factual basis for governmental regulations or decisions or to apply deferential standards of review.

In light of the deferential, predominantly legal nature of this inquiry, it is not surprising that, in applying this standard, courts have almost invariably resolved this issue as one of law. In case after case, the issue of whether a regulation substantially advanced a legitimate public purpose has been decided by courts as a matter of law. *See, e.g., Goldblatt* v. *Hempstead*, 369 U.S. 590, 595-96 (1962); *Agins*, 447 U.S. at 260-263; *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104, 122 (1978). In all such cases, the courts concluded that the challenged regulation satisfied the deferential standard of liability and could not be said to constitute a taking on this basis. Even when the takings issue was reviewed following a trial of some sort, this Court has treated the issue as one of law and accorded little or no deference to the lower court's determination. *See, e.g., Penn Central Transp. Co.*, 438 U.S. at 130-31.

The conclusion that the "substantially advance" test under the takings clause is a predominately legal issue for resolution by the courts is reinforced by the courts' treatment of analogous or equivalent substantive due process challenges to state and local regulations.[7] The component of a takings analysis which requires that a regulatory action substantially advance a legitimate public purpose has its origin in substantive due process

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[7] While the Court has stated that a taking can be found if a regulation does not substantially advance a legitimate public purpose, it has never so held. The City concurs with arguments made by amici that this analysis has its origin in substantive due process precedent and principles and is indistinguishable from a substantive due process analysis in the context of a regulatory denial of a permit.

principles and precedents. The cases articulating and discussing this component of takings analysis frequently cite and rely upon substantive due process standards and precedent. *See, e.g., Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 834-35 (1987) (citing *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), a due process case using "arbitrariness" standard of review); *Agins*, 447 U.S. at 260 (citing *Village of Euclid, supra*, and *Nectow* v. *City of Cambridge*, 277 U.S. 183, 188 (1928), a due process case using "arbitrary and irrational" standard of review); *Bickerstaff Clay Products* v. *Harris County, Georgia*, 89 F.3d 1481, 1489-1490 (11th Cir. 1996); *McDougal* v. *County of Imperial*, 942 F.2d 668, 677 (9th Cir. 1991) (noting the Supreme Court's use of *Village of Euclid* in *Agins* and *Nollan*).

In the substantive due process context, the federal courts have recognized that whether there is a rational basis for land use decisions is a mixed question of fact and law to be decided by the courts. *See, e.g., New Port Largo, Inc.* v. *Monroe County*, 95 F.3d 1084, 1091 (11th Cir. 1996), *cert. denied*, 117 S.Ct. 2514 (1997); *Pearson* v. *City of Grand Blanc*, 961 F.2d 1211, 1221-22 (6th Cir. 1992); *Greenbriar, Ltd.* v. *City of Alabaster*, 881 F.2d 1570, 1578 (11th Cir. 1989); *Bateson* v. *Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988); *see also Midnight Session, Ltd.* v. *City of Philadelphia*, 945 F.2d 667, 682 (3rd Cir. 1991), *cert. denied*, 503 U.S. 984 (1992).

Important functional considerations also support entrusting to the courts the responsibility for determining whether a challenged regulation or action substantially advances a legitimate public purpose. As the Court explained in *Markman*:

> Where history and precedent provide no clear answers, functional considerations also play

> their part in the choice between judge and jury to define terms of art. We said in *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985), that when an issue "falls between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."

Markman, 517 U.S. at 388.

As was true in *Markman*, determining that there is some legal basis for governmental actions is "one of those things that judges often do and are likely to do better than juries unburdened by training in exegesis." *Id.* Moreover, giving courts the responsibility for such decisions is more likely to promote consistency in decision-making which is an "independent reason" to give such responsibility to the courts. *Id.* at 390; *see also Ornelas* v. *United States*, 517 U.S. 690, 697-698 (1996) (whether probable cause existed was mixed question of fact and law that would be reviewed *de novo* by the appellate courts so as to facilitate consistency and clarity of constitutional principles).

The present case illustrates the institutional limitations of the jury and how permitting juries to decide constitutional issues as a purely factual matter will result in confusion and uncertainty. The jury in this case may have found an unconstitutional taking because it concluded that the City's denial of the proposed development did not bear a reasonable relation to legitimate environmental protection or health and safety goals. Yet, as is typical, the jury's verdict provides no insight or guidance as to why it reached this conclusion. Thus, if this City or other public agencies were faced with future

applications to develop this property or other property in similar circumstances, those public agencies would have no way of knowing what criteria to employ to avoid liability. Judicial resolution of inverse condemnation liability issues would result in an opinion or findings setting forth the basis of the decision, which would provide guidance to the City and other public agencies and a meaningful basis for appellate review.

Treating the issue of whether a regulation substantially advances a legitimate public purpose as one of law would also minimize inconsistent application of constitutional principles. Suppose, for example, two cities deny two identical developments based upon inadequacies in two identical restoration plans. If juries are allowed to decide liability issues as a question of fact, two separate trials could result in one finding that the denial is a taking and another that the denial is not a taking. Yet, if the issue is treated as a factual matter, both of these decisions may be sustainable on appeal, leaving directly inconsistent results. No such anomaly is likely to arise if the issue is treated as one of law.

2. The "Economically Viable Use" Test of Inverse Condemnation Liability Is Properly Decided by the Court Rather Than the Jury.

Even if reasonably related to a legitimate interest, a governmental action or regulation may result in a taking if it deprives a property owner of all economically viable use of that property. *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992). "The principle that underlies this doctrine is that, while most burdens consequent upon government action undertaken in the public interest

must be borne by individual landowners as concomitants of the advantage of living and doing business in a civilized community, some are so substantial and unforeseeable, and can so easily be identified and redistributed, that justice and fairness require that they be borne by the public as a whole." *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 14 (1984) (internal quotations omitted). Although the underlying principle is easy enough to articulate, applying the principle "has proved to be a problem of considerable difficulty." *Penn Central Transp. Co.*, 438 U.S. at 123.

There is no "set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government rather than remain disproportionately concentrated on a few persons." *Id.* at 124. Rather, the circumstances of each case must be evaluated. "[J]udicial determinations have relied on ad hoc factual inquiries and case-specific weighing of the competing public and private interests. Resolution of each case 'ultimately calls as much for the exercise of judgment as for the application of logic.' " *Armour and Co., Inc.* v. *Inver Grove Heights*, 2 F.3d 276, 278 (8th Cir. 1993) (internal citation omitted).

The Court has identified three factors to be especially considered in conducting this ad hoc analysis: (1) the economic impact of the challenged action, (2) the extent of interference with distinct investment-backed expectations and (3) the character of the governmental action. *See Connelly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-25 (1985); *Penn Central Transp. Co.*, 438 U.S. at 124; *Corn* v. *City of Lauderdale Lakes*, 95 F.3d 1066, 1072 (11th Cir.), *cert. denied*, 118 S. Ct. 441 (1996); *Armour and Co., Inc.*, 2 F.3d at 278. The Court has never expressly decided

whether courts or juries are responsible for evaluating these factors and applying this test. Everything in the Court's jurisprudence in this area, however, suggests that the question must be one for the courts, not juries.

On its face, it would appear that evaluation of the economic impact of the challenged action is a type of inquiry that could be appropriate for either courts or juries. However, closer analysis reveals a judicial gloss applied to this term, which makes the inquiry neither simple nor jury friendly. The threshold issue of any economic impact analysis is necessarily the legal impact and limitations imposed by the challenged regulations or action. Whether this threshold issue involves construction of a zoning ordinance, an administrative regulation or a conditional use permit, it is decidedly a legal rather than factual matter.

Even beyond the threshold issue of the legal impact of the challenged regulation, entrusting economic impact issues to a jury would be problematical. Superficially, determining the existence of an "economically viable use" would appear to be purely a matter of economic analysis. However, this is not the case. It is settled that a regulatory takings is not to be determined based on the impact on expected profits. *See MacLeod* v. *Santa Clara County*, 749 F.2d 541, 548 (9th Cir. 1984), *cert. denied*, 472 U.S. 1009 (1985). It is also settled that the absence of economically viable use cannot be established by showing diminution in value caused by the regulation, even if that diminution is very substantial. *See, e.g., Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 596 (1962) (80% diminution in value); *Village of Euclid*, 272 U.S. at 384 (75% diminution in value); *Hadacheck* v. *Sebastian*, 239 U.S. 394, 404-08 (1915) (87.5% diminution); *William C. Haas & Co.* v.

City & County of San Francisco, 605 F.2d 1117, 1120 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980) (affirming summary judgment for defendant despite 95% diminution); *Pace Resources, Inc.* v. *Shrewsbury Township*, 808 F.2d 1023, 1031 (3rd Cir.), *cert. denied*, 482 U.S. 906 (1987) (89% diminution). Because the meaning of "economically viable use" and the types of impacts that will constitute a taking are not susceptible of clear definition, there is no simple legal formulation or standard that can be meaningfully applied by a jury.

The second factor to be considered, the extent to which the regulation interferes with "distinct investment-backed expectations," is similarly beyond the purview of factual questions appropriate for jury determination. "A 'reasonable investment backed expectation' must be more than a 'unilateral expectation or an abstract need.' " *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980) "Reasonable expectations must be understood in light of the whole of our legal tradition." *Lucas*, 505 U.S. at 1035 (Kennedy, J. concurring). Were this not the case, perhaps juries could reasonably be expected to fix the meaning of this factor. But juries are ill-suited to the task of evaluating the regulatory climate and assessing, as a matter of law and policy, whether a particular landowner had a "distinct investment-backed expectation." *See, e.g., Concrete Pipe Prods. of Cal., Inc.* v. *Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602 (1993) (no reasonable expectation in light of Congressional legislation in pension field); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 985, 1005-06 (1984) (no reasonable expectation that EPA would keep submitted data confidential, in light of prior legislative amendments); *Golden Pacific Bancorp* v. *United States*, 15 F.3d 1066, 1074 (Fed. Cir.), *cert. denied*, 513 U.S. 961

(1994) (no reasonable expectation that Federal Deposit Insurance Corporation would not take over insolvent bank).

The final factor, requiring evaluation of the "character" of the governmental action, is likewise most appropriately assigned to courts. For example, even if a regulatory action deprives property of all economically viable use, it is still necessary to consider whether the regulation can be upheld because the circumstances prompting the regulation amount to a public nuisance. *Lucas*, 505 U.S. at 1031. This inquiry "will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, the social value of the claimant's activities and their suitability to the locality in question and the relative ease with which the alleged harm can be avoided . . . ." *Id.* at 1030-31 (citations omitted). Given the nature and complexities of this analysis, it is not surprising that courts, rather than a jury, are normally charged with determining the existence of a public nuisance. *See Tull*, 481 U.S. at 423.

The approach taken by courts in evaluating whether state or local regulations have confiscatory impacts in other contexts demonstrates that the takings inquiry is a hybrid of questions of fact and questions of law. For example, the Fifth Amendment prohibits a state or local government from imposing limits on rates or rents that are so unjust as to be confiscatory. *See Duquesne Light Co.* v. *Barasch*, 488 U.S. 299, 307 (1989) (state regulation of utility rates); *Kavanan* v. *Santa Monica Rent Control Bd.*, 16 Cal. 4th 761, 763 (1997) (local regulation of rents). While

the inquiry into the confiscatory impact of such regulations is necessarily very fact-oriented, the notion of submitting such issues to juries for resolution as a purely factual matter makes no sense. As a result, courts have decided and reviewed this issue as one of law. *See, e.g., Duquesne Light Co.*, 488 at 307.

II. THE NINTH CIRCUIT'S DECISION THAT A TRIER OF FACT CAN DETERMINE INVERSE CONDEMNATION LIABILITY BY REWEIGHING CONFLICTING EVIDENCE FUNDAMENTALLY ALTERS THE ROLE OF THE CONSTITUTION IN THE REVIEW OF LOCAL LAND USE POLICIES AND DECISIONS.

The Ninth Circuit's decision in this case fundamentally changes and expands the role of the Fourteenth Amendment and Section 1983 in the review of local land use policies and decisions. It does so by changing the standard of constitutional review in regulatory takings cases from one which requires only that a challenged action sufficiently relate to a valid public purpose to one of "reasonableness" with the jury free to find inverse condemnation liability if it disagrees with the conclusion reached by the local public entity based upon essentially the same evidence.

As discussed above, this Court has stated that, in a regulatory takings context, inverse condemnation liability exists if a challenged regulation or action fails to substantially advance a legitimate public purpose. *Agins*, 447 U.S. at 260. Neither *Agins* nor subsequent cases have elaborated on the application of this test in the regulatory takings context. However, nothing in *Agins* suggests that the Court intended to fundamentally change the deferential approach that federal courts have historically accorded to local land use regulations. In fact, *Agins* cited

approvingly the "seminal" case of *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), in which the Court explained that a land use ordinance would not be declared unconstitutional unless "such provisions are clearly arbitrary and unreasonable, having *no substantial relation* to the public health, safety, morals or general welfare." 272 U.S. at 395. (emphasis supplied) Essentially, *Agins* took the *Euclid* "no substantial relation" language and restated it as an affirmative standard that regulations should "substantially relate" to a legitimate state interest.

Subsequent to *Agins*, courts in regulatory takings cases have generally repeated the *Agins* "substantially advance a legitimate state interest" test rather than describing their review in substantive due process terms. However, regardless of whether the standard of constitutional review described in *Agins* was intended to differ from the standard formulated and applied in the substantive due process context, the change in the precise formulation of the standard did not eliminate the deference that the federal courts had traditionally given to local land use decision-makers. *Esposito*, 939 F.2d at 169 (sand dune protection upheld; "we view the matter as one in which [s]tate legislatures . . . who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require."). This deference does not derive from the specific constitutional provision (takings versus due process), but from principles of federalism and the limited role of the Constitution and the federal courts in the review of local legislature and administrative land use decisions. Simply put, it is the responsibility of local governments to determine policy, evaluate competing concerns and conflicting information, and make land use decisions. The

Constitution does not contemplate that this responsibility will pass to the federal courts (or federal juries) merely because the decision is subject to constitutional challenge. *See Village of Belle Terre* v. *Borass*, 416 U.S. 1, 8 (1973); *Zahn* v. *Board of Public Works*, 274 U.S. 325, 328 (1927).

For this reason, in addressing "takings" or substantive due process challenges, courts do not conduct *de novo* inquiries into the merits of land use regulations or the correctness of governmental decisions that such regulations are appropriate. Rather, courts employ deferential standards of review and require only that there be some basis to support the local government's decision. *See Pearson*, 961 F.2d at 1222 ("The federal court may make only the most limited review of the *evidence* before the state administrative agency.") (emphasis in original).

As discussed above, the deferential nature of the review to be given to local land use regulations and decisions was one of the reasons that regulatory taking liability issues are predominantly legal and are to be decided by courts. Here, however, the Ninth Circuit not only upheld the use of a jury to decide such liability issues but compounded this error by treating the liability issue as a purely factual inquiry into the reasonableness of the City's decision based upon the jury's *de novo* review of the evidence. As to each reason by identified in the City's denial of the proposed development, the Ninth Circuit described the conflicting evidence and upheld the jury decision because Del Monte Dunes had presented some evidence sufficient to rebut each of the City's reasons. Pet. App. 17-19.

The Ninth Circuit's decision fundamentally changes the traditionally deferential approach applied to local land use decisions. In effect, the panel's decision would

allow any jury to become a substitute city council with the power to impose constitutional liability if it chooses to reject evidence supporting the local decision and to accept other evidence that the legislative or quasi-legislative body found unpersuasive.

In the present case, for example, the record demonstrates that the City Council was presented with substantial evidence from state and federal regulatory bodies and others that the proposed development would harm sensitive habitat and that the final restoration plan proposed by Del Monte Dunes would not adequately mitigate that harm. Among other things, in a letter presented to the City Council during the public hearing process, the Assistant Regional Director of USFWS advised the City Council that "[o]ur position has been clearly stated – the project will destroy most, if not all of the Smith's blue butterflies (SBB) and their host plants on the site (p. 6), and the final restoration plan will not likely succeed in replacing lost habitat or preserving SBB at the location." Jt. App. 150. At that same hearing, a Cal DFG representative advised the City Council that his department still had problems with the project and that "the restoration plan [had] not been approved." Jt. App. 288. Prior input from a habitat expert, Dr. Richard Arnold, had raised these same concerns over the measures proposed by Del Monte Dunes to mitigate environmental damage. Jt. App. 145-46. While Del Monte Dunes witnesses conceded that the subject property raised important environmental issues, they presented their views that the restoration plan was adequate.

Under the approach traditionally applied in reviewing land use regulations, the focus would be whether the City's action (denying the development) had a sufficient

relationship to environmental protection goals, and the City's action could not be found unconstitutional merely because a court (or jury) chose to accept the property owner's evidence that the owner had adequately mitigated the environmental impacts. However, in upholding the jury's verdict the Ninth Circuit concluded that "the jury was entitled to credit Del Monte's experts, and discredit the City's testimony."[8] By establishing a new standard of liability that permits a jury to reweigh the evidence and *de novo* determinations as to the reasonableness of the City's decision, the panel has fundamentally and erroneously changed the scope of constitutional review of local land use decisions.[9]

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[8] In its opinion, the Ninth Circuit suggested that there was evidence that the City had "already approved Del Monte's environmental restoration plan in 1984. . . ." Pet. App 17. This is simply wrong. As noted above, in approving the site plan in 1984, the City Council and staff made very clear that there was insufficient information at that time to approve or disapprove the preliminary restoration plan. Jt. App. 273-80. The CUP granted in 1984 expressly conditioned approval of the development upon the development of an adequate restoration plan. Jt. App. 60-65.

[9] Similarly, the jury was allowed to determine, as a factual matter, that the City could not constitutionally reject Del Monte Dunes' proposal because the City did not want to obligate itself to condemn private property for Del Monte Dunes' benefit. The City required Del Monte Dunes to have a secondary, emergency accessway for the proposed development. To obtain this accessway, Del Monte Dunes needed to acquire an easement from the owner of the neighboring property but had taken no steps to do so. R. 286. Instead, Del Monte Dunes apparently expected that the City would condemn this property. However, the City Council was reluctant to use its condemnation power for the benefit of a private developer. Jt. App. 289-90. The City therefore rejected the proposal because it failed to provide the

The Ninth Circuit's adoption of a *de novo* reasonableness test as the constitutional standard of review has implications for virtually all land use decisions made by public agencies. Almost invariably, significant development proposals will raise a number of legitimate public concerns and the information considered by the local decision-making body will be in conflict as to the magnitude of these concerns and the extent to which they have been mitigated. For example, a city may believe that a new proposed development will cause serious traffic problems that have not been adequately mitigated by proposed developer-paid roadway improvements. The Ninth Circuit's standard would allow any party to mount a successful constitutional challenge to any denial of a project merely by showing that the local decision-maker acted unreasonably in rejecting the evidence favoring development.

The extraordinary result of the panel's application of this new standard is made stark by comparing the panel's review of the jury's decision with the district court's decision on the analogous substantive due process claim, which was not challenged by Del Monte Dunes on appeal. Based upon the same evidence considered by the jury, the district court decided, as a matter of law, that the City had not acted arbitrarily and "was not attempting to forestall all reasonable development." The district court concluded that the City was acting in good faith and that

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required secondary accessway. Tr. Exh. 151. By virtue of the *de novo* approach upheld by the Ninth Circuit, the jury was allowed to countermand this policy decision and determine that the City had acted unconstitutionally in refusing to condemn property for Del Monte Dunes' benefit.

there was substantial evidence supporting the City's concern that habitat protection concerns had not been met. Pet. App. 36-43. This conclusion is not surprising inasmuch as both Cal DFG and USFWS raised questions concerning the adequacy of the final restoration plan proposed by Del Monte Dunes. The information and conclusions of these agencies, which possess special expertise in such matters, provided a more than ample basis to support the City Council's decision under the traditional, deferential standard. Yet, the Ninth Circuit allowed the jury finding of inverse condemnation liability to stand merely because Del Monte Dunes had presented evidence (apparently accepted by the jury) that the City's decision was unreasonable.

III. THE NINTH CIRCUIT'S DECISION CONSTITUTES AN ERRONEOUS AND UNWARRANTED EXPANSION OF THE ROUGH PROPORTIONALITY TEST ADOPTED BY THIS COURT IN *DOLAN V. CITY OF TIGARD.*

While the jury was asked in jury instructions to determine whether the City's action bore a reasonable relationship to any legitimate public purpose, the Ninth Circuit's decision upholding inverse condemnation liability did not apply this standard. Rather, the Ninth Circuit imposed a new and different standard based upon *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), which was decided by the Supreme Court months after the jury reached its verdict in the present case.[10] The Ninth

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[10] The Ninth Circuit's reliance on the decision in *Dolan* was unexpected, to say the least. Neither side had cited *Dolan* in their respective Ninth Circuit briefs prior to the issuance of the Ninth Circuit decision.

Circuit concluded that the City's action must not only further a legitimate public purpose, but that the action must also be "roughly proportional" to that purpose. Pet. App. 16 ("Even if the City had a legitimate interest in denying Del Monte's development, its actions must be 'roughly proportional' to furthering that interest.").

As a matter of law, the panel's extension of the *Dolan* holding into the regulatory takings context of the present case was inappropriate. *Dolan* arose in the context of a land use decision that had required that a landowner dedicate property to a public entity. *Dolan* provided a standard for determining whether such a dedication would be excessive. Central to the *Dolan* analysis is the distinction between governmental action which regulates property uses and governmental actions that require that an interest in the property be dedicated to the public agency. As the Chief Justice explained in *Dolan*:

> The sort of land use regulations discussed in the [regulatory takings] cases just cited . . . differ from the present case. . . . [T]he conditions imposed were not simply a limitation on the use petitioner might make of her own parcel but a requirement that she deed portions of her property to the city.

512 U.S. at 385.

The distinction made in *Dolan* between property regulation, on the one hand, and development conditions requiring the actual conveyance of property interests, on the other hand, was previously emphasized by this Court in *Nollan*. In *Nollan*, this Court explained that "[w]e are inclined to be particularly careful about the adjective [substantial] where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is heightened risk that the

purpose is avoidance of the compensation requirement, rather than the stated police power objective." 483 U.S. at 841.

In articulating its rough proportionality standard, *Dolan* expressly held that the city in that case "must make some sort of individualized determination that the required dedication related both in nature and extent to the impact of the proposed development." 512 U.S. at 391. By its express terms, this standard was applied only to a required dedication of property, and nothing in *Dolan* suggests that its holding changed the settled standard of inverse condemnation liability in regulatory taking cases that a challenged action need only bear a reasonable relationship to a legitimate public purpose.

Consistent with the language and rationale expressed in both *Dolan* and *Nollan*, the vast majority of federal courts have held that the *Dolan* standard is limited to the exactions context. *See, e.g., New Port Largo, Inc.* v. *Monroe County*, 95 F.3d 1084, 1088 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 2514 (1997) (distinguishing *Nollan* and *Dolan* as inapposite because in those cases the "state had demanded that a person open his or her property to the public . . . ."); *Clajon Production Corp* v. *Petera*, 70 F.3d at 1578 ("Based on a close reading of *Nollan* and *Dolan*, we conclude that these cases (and the tests outlined therein) are limited to the context of development exactions where there is a physical taking or its equivalent.").

By applying a different and somewhat more exacting standard in cases involving required dedication of property, the *Nollan* and *Dolan* decisions were in accord with prior precedents, which consistently differentiated between physical takings and regulatory takings. Because

physical takings directly interfere with the actual ownership or physical possession of property, liability arises under the Fifth Amendment regardless of the public's benefits or the availability of remaining uses for the property. *See Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). Not surprisingly, courts have been careful to differentiate between physical takings and regulatory takings and to employ very different analyses in the two situations.

The required dedications of property that were being challenged in both *Nollan* and *Dolan* were somewhat akin to a physical taking. In each case, the Court emphasized that, absent some affirmative justification, a requirement that a property owner convey an easement to the public would constitute a taking. *Dolan*, 512 U.S. at 384; *Nollan*, 483 U.S. at 831. For this reason, this Court in *Dolan* deemed it appropriate to impose upon the public agency the burden of justifying the dedication requirement. This rationale does not apply in the context of a regulatory denial where there has been no required dedication of property or anything else akin to a physical taking. *See Garneau* v. *City of Seattle*, ___ F.3d ___, 1998 W.L. 214579 (9th Cir. 1998).

Aside from the important legal distinction between regulating property and requiring dedication of property interests, there are also practical reasons that the *Dolan* rough proportionality standard cannot be applied in a regulatory denial context. An essential prerequisite to application of the rough proportionality standard in *Dolan* is the ability to compare the expected impacts of a project to the particular dedication requirement imposed by the public entity. However, in cases involving a regulatory denial of a project, no such comparison can be

made. The denial may be based upon a myriad of factors or reasons that cannot be readily isolated from one another in the minds of the decision-maker. Even more importantly, however, assuming that each such concern could be isolated, there is no way to evaluate meaningfully the rough proportionality of a project's impact as to each such area of concern. Because there is no specific condition or dedication requirement being imposed in a regulatory denial context, the rough proportionality test is meaningless.

For example, a typical residential proposal will raise a number of possible concerns, including traffic, impacts on environment, increased demands on public services and other considerations. Suppose a city rejects a proposed development due to traffic concerns. As to such traffic concerns, there would be no way to compare the magnitude of the City's concern to the expected traffic burdens of the development for purposes of a rough proportionality test. For this reason, even assuming that it was feasible to treat separately each area of possible concern and to make an individualized determination of expected project impacts to the extent required by *Dolan*, the rough proportionality test cannot be applied in any meaningful way.[11]

The facts of the present case aptly illustrate the Ninth Circuit's error in applying the *Dolan* rough proportionality standard in a regulatory denial context. The City

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[11] Put otherwise, the rough proportionality test requires that X (the dedication condition) be roughly proportional to Y (the project impacts). In a regulatory denial context, while it would often be administratively burdensome, it may be possible to estimate project impacts (Y) for each area of concern. However, there is no X to which those impacts can be compared.

denied Del Monte Dune's proposed 190-unit development due to environmental and other concerns. The City Council concluded that the final restoration plan proposed by Del Monte Dunes was inadequate. The basis for that denial was not Del Monte Dunes' unwillingness to convey property interests demanded by the City.

The Ninth Circuit concluded the City had the obligation to show that its action (denial of the proposed development) was roughly proportional to the environmental protection concerns. However, even putting aside the fact that the *Dolan* rough proportionality standard was not established until after this case was tried, there is no way for the City to meet this burden. While the City could and did present evidence of the environmental significance of the subject property and the expected impacts of the project, the Ninth Circuit's standard of liability requires more. If the Ninth Circuit standard requires that the environmental concerns be roughly proportional to a decision denying *any* development on the subject property, the standard misconceives the City's decision, which was only to deny a specific proposed 190-unit development, including the specific habitat mitigation measure in the final restoration plan. On the other hand, if the Ninth Circuit standard would require that the environmental concerns be roughly proportional to the burdens imposed by a restoration plan that would be acceptable to the City, there is no way to apply this standard because the terms of any such acceptable plan are purely hypothetical.

Even assuming that some meaningful way of applying the rough proportionality standard to regulatory denial could be devised, doing so would constitute a major departure in the constitutional review of such decisions. Any dissatisfied property owner could challenge

rationally-based land use regulations or decisions that had appropriate goals by claiming that the concerns underlying the decision were not roughly proportional to the impacts of the proposed development. Thus, for example, a local decision to deny a project based upon concerns that the proposed project did not adequately address risks of earth movement could be constitutionally challenged on the ground that these concerns were not roughly proportional to the impacts of the project. Similarly, a regulatory decision that a proposed building had not mitigated seismic concerns could be rendered void unless the public agency established that its concerns or its design requirements were roughly proportional to the impacts of the project.

In and of itself, extending the rough proportionality standard into the context of regulatory denials would be an erroneous and unwarranted expansion of constitutional review over land use decision-making. When combined with the Ninth Circuit's application of a fact-based reasonableness standard of liability based upon *de novo* review of the relevant information considered by the public agency, the Ninth Circuit's decision would turn the federal courts (or juries) into land use planners and expose local agencies across the country to great uncertainty and unwarranted liability.

CONCLUSION

For all of the reasons set forth above, the City respectfully requests that the Ninth Circuit's decision in this matter be reversed.

Respectfully submitted,

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